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# Procedural Control of Damages

## By Election of Remedies

By DUANE W. DRESSER\*†

The lawyer who contemplates seeking redress of his client's rights is confronted with the initial problem of choosing the most effective course to enforce those rights. Although in many situations there is but one course, well-defined by law and custom, it is not unlikely that there will be, particularly in litigation arising out of contractual relations, two or more available methods of enforcing a claim. Questions which may arise in such circumstances include not only how much may be recovered but how far can pursuit of one method proceed without loss of the others, which method affords the most certain recovery, or the speediest recovery, or the least difficult recovery in terms of procedure obstacles.

It is the purpose of this article to examine the rule of election of remedies as it bears upon such questions. It is hoped that some light may thereby be cast upon the advantages and disadvantages inherent in the available remedies and that some assistance may be given toward the proper selection of remedies.

### THE RULE OF ELECTION OF REMEDIES

A statement of the rule of election of remedies which would appear to be generally agreed upon today is:

Whenever a party entitled to enforce two or more remedies performs any act in pursuit of one of such remedies whereby he gains an advantage over or occasions damage to the other party, he will be held to have made an election of such remedy and be precluded from pursuing any other remedy for enforcement of his right.

This statement is taken from that declared by the court in *DeLavel Pac. Co. v. United C. & D. Co.*<sup>1</sup> with the omission of the provision therein that institution of an action upon one of the remedies constitutes an election. While it seems well-settled today that institution of

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<sup>1</sup> 65 Cal. App. 584, 586, 224 Pac. 765, 766 (1924). Other statements of the rule are found in *Schumm v. Berg*, 37 Cal. 2d 174, 189, 231 P.2d 39, 47 (1951); *Mansfield v. Pickwick Stages*, 191 Cal. 129, 130, 215 Pac. 389, 390 (1923); *Martin Music Co. v. Robb*, 115 Cal. App. 414, 420, 1 P.2d 1000, 1002 (1931).

an action, *in itself*, will not bar subsequent pursuit of another remedy<sup>2</sup> nevertheless, the notion that mere commencement of a suit bars other remedies is expressed in many earlier cases<sup>3</sup> and it would be unwise to assume that some vestige of this position does not yet remain.<sup>4</sup>

Similarly, the familiar principle of alternative pleading permits a plaintiff today to set out in his complaint more than one legal theory based upon the same factual transaction or episode.<sup>5</sup> Provided his factual allegations are not altogether inconsistent, he cannot be compelled to elect, prior to judgment, one or the other theory although the measure of damages or type of relief obtainable under the different theories might vary considerably.<sup>6</sup>

This rule is closely allied to, and sometimes indistinguishable in its application from, the doctrine of *res judicata*.<sup>7</sup> However, problems arising after a matter has gone to final judgment on the merits will be presumed to fall more properly within the scope of *res judicata* and will not be treated here except incidentally.

Election of remedies is said to be but an application or extension of the principle of estoppel<sup>8</sup> and that it "... is a harsh, and now largely obsolete rule, the scope of which should not be extended."<sup>9</sup> Nevertheless, because it is estoppel applied in a long-recognized context, i.e., the procedural phase of enforcement of rights, it is deemed desirable to treat the topic in accordance with its traditional characterization.

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<sup>2</sup> *Campanella v. Campanella*, 204 Cal. 515, 269 Pac. 433 (1928); *Mansfield v. Pickwick Stages*, *supra* note 1 (voluntary dismissal and refile of action for damages); *Warfield v. Richey*, 167 Cal. App. 2d 93, 334 P.2d 101 (1959) (voluntary dismissal and refile complaint upon another theory). There is a suggestion, however, in *Garrick v. J. M. P., Inc.*, 150 Cal. App. 2d 232, 309 P.2d 896 (1957) that at some stage a shifting of theories could be so detrimental to a defendant that plaintiff would be bound to his remedy under the original theory.

<sup>3</sup> *Silverstin v. Kohler & Chase*, 181 Cal. 51, 53, 183 Pac. 451 (1919); *Hines v. Ward*, 121 Cal. 115, 53 Pac. 427 (1898); *Parke etc. Co. v. White River L. Co.*, 101 Cal. 37, 41, 35 Pac. 442 (1897); *DeLaval Pac. Co. v. United C. & D.*, 65 Cal. App. 584, 224 Pac. 766 (1924); *Geo. J. Birkel Co. v. Nast*, 20 Cal. App. 651, 129 Pac. 945 (1912).

<sup>4</sup> See *e.g.*, *Alder v. Drudis*, 30 Cal. 2d 372, 182 P.2d 195 (1947); *Alton v. Rogers*, 127 Cal. App. 2d 667, 274 P.2d 487 (1954); *Crittenden v. Hansen*, 59 Cal. App. 2d 56, 138 P.2d 37 (1943), all discussed *infra*.

<sup>5</sup> *Acadia, California, Ltd. v. Herbert*, 54 Cal. 2d . . . , 353 P.2d 294, 5 Cal. Rptr. 686 (1960) (breach of contract and tort theories); *Steiner v. Rowley*, 35 Cal. 2d 713, 221 P.2d 9 (1950) (fraud and implied contract theories).

<sup>6</sup> *Acadia, California, Ltd. v. Herbert*, *supra* note 5.

<sup>7</sup> See *e.g.*, *Slater v. Shell Oil Co.*, 58 Cal. App. 2d 864, 137 P.2d 713 (1943), wherein the court refrained from deciding whether the result reached was upon the basis of election of remedies, *res judicata*, merger or estoppel.

<sup>8</sup> *Steiner v. Rowley*, *supra* note 5; *Commercial Centre R. Co. v. Superior Court*, 7 Cal. 2d 121, 59 P.2d 978 (1936).

<sup>9</sup> *Perkins v. Benguet Cons. Min. Co.*, 55 Cal. App. 2d 720, 756, 132 P.2d 70, 93 (1942) quoting from *Friedericksen v. Renard*, 247 U.S. 207 (1918).

This article, then, will discuss those situations involving the same parties<sup>10</sup> and arising out of the same factual background<sup>11</sup> in which, prior to final judgment on the merits two<sup>12</sup> or more remedies are available.

## SITUATIONS IN WHICH AN ELECTION MAY OCCUR

It is not possible to place within a precise framework of various legal characterizations all the imaginable situations in which a choice of remedies may occur. For purposes of convenience in this discussion, rather than any inherent grouping, the following categories, which cover the majority of election problems, will be used:

1. Actions involving contract remedies;
2. Actions involving a choice of tort or contract remedies;
3. Action involving security interests;
4. Actions involving title or possession to real property.

### 1. Actions Involving Contract Remedies

With but a few exceptions, all of the cases discussed in this article involve a contractual obligation in some manner. For the purposes just declared, however, those cases in which the contract is combined with a tort remedy, with a security interest or with some other property interest will be discussed separately.

Other than in such cases, election problems involving contracts arise in two rather distinct situations: upon breach of a contract and upon the fraudulent inducement of a contract.

#### *Breach of Contract*

One injured by a breach of contract is said to have three remedies: first, rescission and restitution (recovery of the consideration or on a quantum meruit basis); secondly, affirmance and specific performance; thirdly, termination and recovery of damages.<sup>13</sup> Which of the three are

<sup>10</sup> The defense is not ordinarily available to a stranger. *Roullard v. Rosenberg Bros.*, 193 Cal. 360, 224 Pac. 449 (1924); *Perkins v. Benguet Cons. Min. Co.*, *supra* note 9, at 755, 132 P.2d at 117; *but see*, *Eistrat v. Brush Ind. Lumber Co.*, 124 Cal. App. 2d 42, 268 P.2d 181 (1954) (discussed *infra*).

<sup>11</sup> Conduct substantially similar to that previously sued upon and occurring subsequent to suit thereon of course gives rise to a new enforceable cause of action. *Yates v. Kuhl*, 130 Cal. App. 2d 536, 279 P.2d 563 (1955).

<sup>12</sup> There is no election if there is but one remedy available at the time of the first suit by plaintiff; *Dettart v. Allen*, 49 Cal. App. 2d 639, 122 P.2d 273 (1942); or if plaintiff mistakes his remedy, *Atchison T. & S. F. Ry Co. v. Superior Court*, 12 Cal. 2d 549, 86 P.2d 85 (1939); or if plaintiff is prevented by defendant's conduct from enforcing the first remedy sought, *Verder v. American Loan Society*, 1 Cal. 2d 17, 38 P.2d 149 (1934).

<sup>13</sup> *Crittenden v. Hansen*, *supra* note 4.

available and which is preferable depends, of course, upon the circumstances. Recission would be called for if plaintiff has parted with something for which he cannot be fully compensated in money. If plaintiff had bargained for some object of unique value to him, specific performance would be in order. If it is too late to repair the damage by performance of the defendant, plaintiff would of course seek damages for his lost profits. Whether the lost profits could be computed with reasonable certainty and the financial responsibility of the defendant would also be obvious factors in selecting the last remedy.

### *Alternative Remedies*

The question then arises whether plaintiff can seek one or more of his remedies in the alternative. In this area there are some fairly recent judicial statements which lend support to the position that plaintiff cannot always plead alternatively but that he must make his election between remedies at the time suit is filed. In *Alder v. Drudis*, the court said: "Damages and restitution are alternative remedies and an election to pursue one is a bar to invoking the other."<sup>14</sup>

Considered by itself this statement would indicate that merely filing suit for one of the available remedies constitutes a binding election, for that is certainly "pursuit." In context, however, it seems clear that what the court intended was that a plaintiff could not have *satisfaction* under both remedies. Plaintiff there sued in claim and delivery for the return of personal property delivered to defendants pursuant to contract, and for damages. It was held that any damages would be nominal because of the speculative nature of the enterprises concerned, but that plaintiff could demand back the property involved which, although of little intrinsic value, was of a unique character.

In *Crittenden v. Hansen*,<sup>15</sup> plaintiff, purchaser under a land sales contract, sued defendant for specific performance and for damages. It was found that plaintiff had not performed and that defendant had conveyed to a bona fide third party, also a defendant, for value. The court did not rest its decision upon nonperformance but said:<sup>16</sup>

Under these circumstances appellant's remedy was by suit in damages against Hansen for breach of contract. But, where two remedies exist, the party must make his election between a suit in equity for specific performance, and a suit in tort [sic] for the breach. He cannot pursue both. Now if appellant had a cause of action for damages for breach of the contract he did not plead it.

This result, although only an alternative holding, seems clearly

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<sup>14</sup> 30 Cal. 2d 372, 383, 182 P.2d 195, 202 (1947).

<sup>15</sup> *Supra* note 4.

<sup>16</sup> 59 Cal. App. 2d 56, 58-59, 138 P.2d 37, 38 (1943).

wrong. Plaintiff's cause of action for specific performance would certainly seem to be adequate support for a judgment for damages. Plaintiff knew that Hansen had conveyed the property but believed that the conveyee-defendant had notice of his contract. Accordingly, his suit for specific performance alone should not have been considered an election because the remedy was unavailable to him through no fault of his own, by reason of defendant's conveyance. As previously noted, the doctrine does not ordinarily apply where the plaintiff in good faith mistakes his remedy or defendant prevents the remedy from being effective.<sup>17</sup>

In *Beal v. United Properties*,<sup>18</sup> cited by the court in the *Crittenden* case, in support of the statement quoted above, plaintiff sought specific performance of an agreement whereby he was to receive certain bonds of defendant. Plaintiff also alleged that he was damaged by fraudulent acts of the defendant. Specific performance was denied because of the uncertainty of the alleged agreement. Concerning the fraud cause of action, the court said:<sup>19</sup>

Assuming that sufficient facts are alleged to sustain such a cause of action, it is evident that an action at law for fraud, growing out of the breach or nonperformance of a contract cannot be joined in a suit in equity for specific performance of the contract or to foreclose an equitable lien. . . . If plaintiff is entitled to specific performance . . . the decree in equity made for that purpose must necessarily adjudicate the rights of the respective parties and would foreclose the plaintiff from an action for damages upon the contract, which is purely an action at law. He has elected to seek the aid of equity and cannot join in such suit an action for damages for fraud.

The reasoning here is not clear but the conclusion seems incorrect in any event. If the court meant that an action on the contract and the action for fraud were improperly "joined," in the sense of joinder allowed by Code of Civil Procedure section 427, it would seem incorrect because the court itself recognized that both causes arose from the same contract. In addition, both clearly arose from the same transaction. Thus, they were properly joined under section 427. It seems clear that the court meant that plaintiff could not pursue both his equitable and legal remedies in one suit and while it is highly unlikely that such a conclusion would be reached today, the statements in the *Alder* and *Crittenden* cases still pose some danger to alternatively pleading for specific performance and damages.

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<sup>17</sup> *Atchison T. & S. F. Ry. Co. v. Superior Court*, *supra* note 12.

<sup>18</sup> 46 Cal. App. 287, 189 P.2d 346 (1920).

<sup>19</sup> *Id.* at 296, 189 Pac. at 351.

### *Exception to "Commencement" Rule*

*Buckmaster v. Bertram*<sup>20</sup> is somewhat similar to *Crittenden* and is a seeming exception to the rule that mere commencement of an action to enforce one theory does not preclude later pursuit of another remedy. Plaintiff was the vendor and defendant the vendee under a land sales contract. Defendant cross-complained asking damages for plaintiff's repudiation of the contract. Defendant later amended to ask specific performance, plaintiff having meanwhile sold some of the lots in question. It was held that defendant was confined to his claim for damages. The court stated that ". . . [A] vendee cannot have both [remedies], and if one is chosen the other is deemed to be abandoned wherever the change of remedy would occasion any injury to parties adversely interested in the matter."<sup>21</sup> This would seem to be a just limitation on the doctrine of alternative pleading, i. e., that one will not be able to seek an otherwise available remedy if his opponent has taken action in reliance upon a previous pleading. It may be that the court in *Crittenden* had such a limitation in mind (although *Buckmaster* was not cited) because defendant testified that plaintiff was trying to "freeze me out" by refusing performance in an attempt to force defendant to lower his price. It could reasonably have been concluded that defendant was justified under those circumstances in selling to another.

The court in *Buckmaster*, however, went on to state what seems like an incorrect rule and one inapplicable to the facts of the case: "The vendee cannot seek damages for the refusal and specific performance in a single cause of action."<sup>22</sup> There seems no reason why the vendee should not be able to seek both remedies, as long as they are sought alternatively in the same complaint or by amendment prior to defendant's reliance upon the apparent intention of plaintiff to pursue but one of the remedies.

### *Fraudulent Inducement of Contract*

Many election problems have arisen out of the situation wherein a contract was fraudulently induced. There are two remedies usually available in such cases: an action for damages, said to be upon the basis that the contract is affirmed, and action for rescission, upon the basis that the contract is disaffirmed.<sup>23</sup> It seems clear that in an action

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<sup>20</sup> 186 Cal. 673, 200 Pac. 610 (1921).

<sup>21</sup> *Id.* at 678, 200 Pac. at 612.

<sup>22</sup> *Supra* note 20, at 678, 200 Pac. at 612.

<sup>23</sup> *Davis v. Rite-Lite Sales*, 8 Cal. 2d 675, 67 P.2d 1039 (1937); *Stockton v. Newman*, 148 Cal. App. 2d 558, 307 P.2d 56 (1957); *DeCampos v. State Group Ins. Fund*, 122 Cal. App. 2d 519, 265 P.2d 617 (1954).

for rescission pursuant to Civil Code section 3406,<sup>24</sup> damages may be prayed for in the event rescission cannot be had although the remedies are mutually inconsistent in that one is not entitled to the return of what he parted with *and* damages.<sup>25</sup> Accordingly, if there is a *completed mutual rescission* between the parties,<sup>26</sup> the defrauded party cannot later seek damages in court.<sup>27</sup> Where, however, there has been an ineffectual attempt to rescind,<sup>28</sup> the defrauded party may subsequently bring an action for damages if the failure was not his fault.

In *Karpetian v. Carolan*,<sup>29</sup> plaintiff purchased a house from defendant and later discovered defects in the house which had been fraudulently concealed. He notified defendant and tendered back a deed. Defendant refused to accept whereupon plaintiff sued for damages. Defendant's contention that plaintiff had made an election to rescind thereby precluding an action for damages was rejected because the attempted rescission was not completed. The court noted a line of cases which held that giving notice of rescission and an offer to restore alone constituted a completed rescission,<sup>30</sup> but followed another line holding there was no election where defendant refused the offer.<sup>31</sup> This result is in accord with the estoppel theory, for the mere giving of notice to defendant puts him at no disadvantage. Accordingly, it was held that plaintiff could still sue for rescission and restoration of consideration, or for damages.

Moreover, such a plaintiff cannot be compelled to elect between his remedies during the course of the trial<sup>32</sup> and the voluntary dismissal

<sup>24</sup> "The rescission of a contract may be adjudged, on the application of a party aggrieved:

1. In any of the cases mentioned in Section 1689; . . . ." Section 1689 provides for rescission by "a party" whose consent was obtained by fraud.

<sup>25</sup> *Williams v. Marshall*, 37 Cal. 2d 345, 231 P.2d 809 (1951); *Davis v. Rite-Lite Sales Co.*, *supra* note 23; *Stockton v. Newman*, *supra* note 23; *DeCampos v. State Group Ins. Fund*, *supra* note 23.

<sup>26</sup> CAL. CIV. CODE § 1689(5), provides for rescission ". . . by consent of all the other parties."

<sup>27</sup> *Evans v. Rancho Royale Hotel Co.*, 114 Cal. App. 2d 503, 250 P.2d 283 (1952).

<sup>28</sup> CAL. CIV. CODE § 1691 provides that for rescission under § 1689: "Rescission, when not effected by consent, can be accomplished only by the use, on the part of the party rescinding, of reasonable diligence to comply with the following rules:

"1. He must rescind promptly, upon discovering the facts which entitle him to rescind, if he is free from duress, menace, undue influence, or disability, and is aware of his right to rescind; and,

"2. He must restore to the other party everything of value which he has received from him under the contract; or must offer to restore the same, upon condition that such party shall do likewise, unless the latter is unable or positively refuses to do so."

<sup>29</sup> 83 Cal. App. 2d 344, 188 P.2d 809 (1948).

<sup>30</sup> *Id.* at 350-51, 188 P.2d at 815 (1948).

<sup>31</sup> *Supra* note 29, at 351-54, 188 P.2d at 815 (1948).

<sup>32</sup> *Williams v. Marshall*, *supra* note 25.



of an action for rescission before a hearing on the merits does not preclude a subsequent action for damages.<sup>33</sup>

### *Areas of Confusion*

Although the results just discussed seem well-settled, there are, as in the breach of contract cases, some disconcerting statements appearing in recent cases and in older cases which have never been disapproved. In *Alton v. Rogers*,<sup>34</sup> defendant had obtained money from plaintiff upon the representation that he would invest it for him. Plaintiff sued upon one count for breach of trust and accounting and a second count for damages for fraud. Defendant contended that these remedies were inconsistent. The court stated that:<sup>35</sup>

The point need not be labored that causes of action based on fraud, rescission and damages are inconsistent and require an election of remedies. But the rule is not here applicable. The first cause of action is not based on fraud warranting a rescission. No rescission is here involved. The first cause of action is one for breach of an oral trust. Such cause of action is not inconsistent with a cause of action for damages.

Although this result seems correct, the first sentence in the quotation, which implies that causes for rescission and damages cannot be pleaded alternatively, seems contrary to the holding of the *Karapetian* case which was decided, incidentally, by the same court.

In *Fulmele v. Los Angeles Inv. Co.*<sup>36</sup> plaintiff sued claiming he was fraudulently induced to purchase stock and that by the terms of the agreement he had an option to demand return of the purchase price in exchange for the certificates. The case was tried upon the fraud theory and rescission was denied because of laches. The court said:<sup>37</sup>

Having brought this action for rescission . . . he waived his right to recover upon the contract itself, and cannot in this action enforce any of its terms. If at the trial the plaintiff had insisted that his action was based upon the contract as well as upon his claimed right of rescission, the defendant might well have required that plaintiff elect upon which of these two inconsistent causes of action he would go to trial.

Although apparently dictum because it appears plaintiff did not plead his contract theory, it should be noted that merely bringing an action was considered a binding election, and that the defendant could have compelled plaintiff to elect had he pleaded both theories. Startling as this may seem, for there is no reason to put such a plaintiff at his peril

<sup>33</sup> *Campanella v. Campanella*, *supra* note 2.

<sup>34</sup> 127 Cal. App. 2d 667, 274 P.2d 487 (1954).

<sup>35</sup> *Id.* at 680, 274 P.2d at 496.

<sup>36</sup> 51 Cal. App. 417, 196 Pac. 923 (1921).

<sup>37</sup> *Id.* at 420, 196 Pac. at 924.

in selecting his remedy, the case has never been disapproved or overruled.<sup>38</sup>

### *Incidental Equitable Aid Not an Election*

A unique variation on the fraudulent contract situation occurred in *Lenard v Edmonds*.<sup>39</sup> Plaintiff, a defrauded buyer, alleged a cause of action for rescission and one for damages. He also secured an injunction against defendant's negotiating the notes given by plaintiff for the property. Defendant contended that the securing of injunctive relief was an election of his equitable remedy and plaintiff was therefore precluded from seeking damages at law. The court held, however, that injunctive relief was not restricted by the Code of Civil Procedure<sup>40</sup> to equitable causes of action but that plaintiff could seek it as an incident to either his remedy of rescission or damages. It did not therefore constitute an election of one or the other remedies.

## 2. Choice of Tort or Contract Remedies

Many election problems arise in situations where the plaintiff can proceed in either tort or contract or both. Sometimes conduct constituting a breach of contract is also considered a tort.<sup>41</sup> More commonly, the problem arises where a defrauded plaintiff can sue for damages in tort or upon implied contract. Here again, mere institution of an action upon one or both theories does not constitute or require an election.<sup>42</sup>

However, in aid of the contract remedy, a plaintiff has the provisional remedy of attachment available,<sup>43</sup> and levy of a writ of attachment upon defendant's property is considered a detriment to defendant which will thereafter preclude pursuit of tort remedies.<sup>44</sup> The practical difference can be great. Attachment, of course, provides a great degree of security in ultimate recovery. On the other hand, the ordinary tort measure of damages is a great deal more extensive than in contract and in certain cases extraordinary damages not available in contract such

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<sup>38</sup> See *Williams v. Marshall*, *supra* note 25, and *Stockton v. Newman*, *supra* note 23, holding that both rescission and damages may be pursued by a defrauded party and that no election can be compelled, at least during the trial.

<sup>39</sup> 156 Cal. App. 2d 764, 312 P.2d 308 (1957).

<sup>40</sup> CAL. CODE CIV. PROC. § 526 (grounds of injunction in general) and §§ 525-534 (specific procedural requirements and provisions).

<sup>41</sup> *Acadia, California, Ltd. v. Herbert*, *supra* note 5.

<sup>42</sup> *Acadia, California, Ltd. v. Herbert*, *supra* note 5; *Steiner v. Rowley*, *supra* note 5.

<sup>43</sup> CAL. CODE CIV. PROC. § 537 limits this remedy to actions upon certain types of contracts. It is not available in a tort action except against a defendant not residing in California or who has departed from California or who cannot be found.

<sup>44</sup> *Sears, Roebuck Co. v. Blade*, 245 F.2d 67 (9th Cir. 1956); *Steiner v. Rowley*, *supra* note 5; *Acme Paper Co. v. Goffstein*, 125 Cal. App. 2d 175, 270 P.2d 505 (1954).

as exemplary or punitive damages may be had.<sup>45</sup> Such enlarged damages will, of course, demand a greater degree of proof which, for example, in the case of malice required for punitive damages, may be extremely difficult to establish.

### *Difference in Measure of Damages*

An extreme example of the difference in the tort and contract measure of damages is found in *Acadia, California, Ltd. v. Herbert*.<sup>46</sup> Defendant there was obligated by contract to furnish a certain quantity of water to plaintiffs which he failed to do. Plaintiffs alleged both tort and breach of contract theories and the jury's verdict awarded both compensatory and punitive damages. In affirming, the court declared that such damages could properly include damages to an individual plaintiff for the loss of his wife's services due to her suffering a relapse in her mental illness, and the annoyance and discomfort to himself and his family, all caused by the decreased water supply. Obviously, such injuries would not be compensable had plaintiffs proceeded solely upon the breach of contract, as mental distress and the like due to breach of contract are considered too remote and speculative.<sup>47</sup> The court justified the extensive damages allowed by comparison to a nuisance or trespass which interferes with the use and enjoyment of one's land and for which similar damages are allowed.<sup>48</sup>

The court also noted that the same act could constitute both a breach of contract and a tort, and if a maliciously committed tort, punitive damages were appropriate. It was also held that plaintiff cannot be compelled to choose between the theories but that the choice can be put to the trier of fact. In such a case, it would obviously behoove one to avoid attachment if the defendant is at all responsible.

A case with an extensive reported history<sup>49</sup> illustrates another possible difference in recovery between proceeding in tort or contract.

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<sup>45</sup> CAL. CIV. CODE § 3294 provides: "In an action for the breach of an obligation *not arising from contract*, where the defendant has been guilty of oppression, fraud, or malice, express or implied, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant." (Emphasis added.) Extraordinary damages are also allowed in a variety of specific situations. See, e.g., CAL. CODE CIV. PROC. § 1174 (unlawful detainer and forcible entry); § 732 (waste by a guardian or tenant); § 733 (damage to trees or shrubbery); § 735 (forcible or unlawful entry); Civil Code § 3344 (holding over after termination of tenancy); Civil Code § 3345 (holding over after notice to quit).

<sup>46</sup> *Acadia, California, Ltd. v. Herbert*, *supra* note 5.

<sup>47</sup> *Westwater v. Grace Cathedral*, 140 Cal. 339, 77 Pac. 929 (1903).

<sup>48</sup> 45 Cal. 2d 265, 288 P.2d 507 (1955).

<sup>49</sup> *Sears, Roebuck & Co. v. Metropolitan Engravers*, 245 F.2d 67 (9th Cir. 1956); *Sears, Roebuck & Co. v. Metropolitan Engravers*, 123 F. Supp. 131 (S.D. Cal. 1959); *Sears, Roebuck & Co. v. Blade*, 139 Cal. App. 2d 580, 294 P.2d 140 (1956).

Defendant Blade was employed by plaintiff as its advertising manager. It was claimed that he obtained "kick-backs" from engravers and printers on work they did for plaintiff. Plaintiff initially sued Blade alone in the state court on a common count and levied attachment upon Blade's property. Prior to judgment in that action, plaintiff brought suit in a federal court against Blade and others alleged to have participated with him in the scheme. It was held that by attaching in the state proceeding pursuant to the same cause of action, plaintiff elected his contractual remedy and was limited to recovery of the money Blade himself had failed to turn over to plaintiff.<sup>50</sup> Plaintiff was precluded from claiming that Blade was liable for any other damage arising from the same transaction, such as the money obtained by his co-conspirators, which liability could have been imposed under the tort theory.

### *Additional Effects of Attachment*

Another effect of attachment upon the damages recoverable is illustrated by *Steiner v. Rowley*.<sup>51</sup> Plaintiff sued defendant, a real estate broker engaged to purchase property for him, claiming defendant had made secret profits. Plaintiff's complaint included counts for money had and received and for fraud seeking punitive damages. Plaintiff had caused the issuance and levy of a writ of attachment and it was held that although the pleading of inconsistent causes was permissible, the attachment was a positive act in pursuit of a contractual remedy whereby plaintiff gained an advantage over defendant. Plaintiff was therefore estopped to allege his tort cause of action and was limited to contractual damages.

In *Acme Paper Co. v. Goffstein*,<sup>52</sup> which involved a defrauded employer suing his employee, the same result was reached, where plaintiff attempted to amend his complaint on a common count, on which attachment was issued and levied, to seek punitive damages.

A variation involving the effect of an attachment is found in *Rippling v. Superior Court*.<sup>53</sup> Plaintiff, by his guardian, sued defendants for funds allegedly paid over to them by plaintiff for safekeeping. Plaintiff caused defendant's property to be attached upon an affidavit stating an indebtedness on express contract. Subsequently the complaint was amended to allege that the money was held in trust. The issue was whether defendants could demand a jury trial. Plaintiff contended they could not because it was an equitable action for enforcement of a trust. The contention was rejected because plaintiff had invoked the legal

<sup>50</sup> *Sears, Roebuck & Co. v. Metropolitan Engravers*, *supra* note 49 at 70.

<sup>51</sup> *Steiner v. Rowley*, *supra* note 5.

<sup>52</sup> *Acme Paper Co. v. Goffstein*, *supra* note 44.

<sup>53</sup> 112 Cal. App. 2d 399, 247 P.2d 117 (1952).

remedy of attachment, and although most actions involving trusts are equitable, a court of law can give complete relief where, as there, the only questions were whether the trustee owed money to the beneficiary, and if so, how much. At common law, the court noted, a beneficiary could enforce payment of money unconditionally due from the trustee by an action of account, a legal action. The court concluded that the plaintiff "... has elected to proceed at law."<sup>54</sup>

### *Use of Election Doctrine by a Stranger*

A unique situation involving choice of contract remedy by attachment is found in *Eistrat v. Brush Ind. Lumber Co.*<sup>55</sup> Plaintiff contracted with V. for the cutting of timber on plaintiff's land, in respect to which cutting V. agreed to comply with certain state and federal rules. Title to the timber was to pass upon cutting. V., without compliance with the rules, cut the timber and sold it to defendant. Plaintiff filed suit against V. to quiet title to the realty and recover monies due under the contract. Defendant was served with a writ of attachment for the amount it owed V. for the timber. Plaintiff then sued defendant claiming conversion of the timber. It was held that plaintiff, by attaching in the other action, had elected his contract remedy and therefore could not pursue a tort remedy even against another party.

This reasoning seems questionable even if the result was correct. As has been seen, the election doctrine is not ordinarily available to a stranger.<sup>56</sup> The attachment here was not against defendant as a defendant but only as a garnishee-debtor of V. Defendant had no interest in who received the garnished money and there would seem to be no detriment to defendant on that account. It does not appear whether plaintiff recovered in his action against V., and if he did, then of course, he should not be allowed to recover twice. In that case, decision should have been upon that ground or possibly upon the basis of *res judicata* rather than election of remedies.

### 3. Security Interests

A mortgagee is, of course, limited by statute to his remedy against the security before a judgment on the obligation can be obtained.<sup>57</sup> This, however, is a matter of defense and is waived if not raised by the debtor.<sup>58</sup> If waived it may result in the loss of the lien or subordination to subsequent liens.<sup>59</sup>

<sup>54</sup> *Id.* at 408, 247 P.2d at 122.

<sup>55</sup> 124 Cal. App. 2d 42, 268 P.2d 181 (1959).

<sup>56</sup> *Perkins v. Benquet Cons. Min. Co.*, *supra* note 9.

<sup>57</sup> CAL. CODE CIV. PROC. § 726.

<sup>58</sup> *Salter v. Urich*, 22 Cal. 2d 263, 138 P.2d 7 (1943).

<sup>59</sup> *Ibid.*

Most mortgages contain a power of sale which is considered in aid of the right to judicial foreclosure and not inconsistent therewith. Accordingly, a judgment may be obtained for the balance due after sale under a power of sale,<sup>60</sup> and commencement of a foreclosure action does not preclude subsequent sale under the power and an amendment of the foreclosure complaint to seek the deficiency.<sup>61</sup>

In *Salter v. Ulrich*<sup>62</sup> defendant held a mortgage on K.'s property as security for a note. Subsequently, street bonds covering the property were issued. Thereafter defendant obtained judgment on the note and executed thereon, buying in at the execution sale in partial satisfaction. Thereafter, in chronological order: the certificate of sale was recorded; O., who had acquired the street bonds, brought an action for foreclosure in which defendant was not named, and K. defaulted; the defendant's deed was recorded; the property was sold to O. on execution; plaintiff purchased O.'s certificate and obtained a deed.

It was held that defendant had title but that it was subject to the bond lien. Defendant's failure to foreclose on his mortgage lien did not forfeit his title; as the defense under Code of Civil Procedure section 726 can be waived after execution of the mortgage. However, having elected to sue on the note, defendant lost the right to foreclose and his title could be no greater than that of his judgment debtor at the time of judgment, i.e., subject to the bond lien which intervened between the execution of the mortgage and the judgment.

### *Satisfaction; Commencement of Suit*

On the other hand, satisfaction of the underlying debt other than by enforcing the lien will not always preclude subsequent enforcement. In *Hines v. Ward*,<sup>63</sup> plaintiff was the mortgagee of T. and took a deed from T. in satisfaction thereof upon T.'s representation that there were no encumbrances upon the property. In fact, as T. knew, R. had secured a judgment lien on the property. Plaintiff's first complaint sought to quiet title under the deed from T., who was not joined. Prior to judgment, T. was joined. R. claimed that plaintiff had elected his remedy under the deed and could not enforce the mortgage lien which had become merged into the title under the deed and was therefore subject to R.'s intervening lien. This claim was rejected because there was no disadvantage to R. caused by plaintiff's proceeding under the deed and because merger will be prevented by a court of equity in such circumstances to preserve the mortgage lien.

<sup>60</sup> Commercial Centre R. Co. v. Superior Court, 7 Cal. 2d 121, 59 P.2d 978 (1936).

<sup>61</sup> Maumann v. Harrison, 46 Cal. App. 2d 84, 115 P.2d 530 (1941).

<sup>62</sup> *Supra* note 58.

<sup>63</sup> 121 Cal. 115, 53 Pac. 353 (1898).

Mere *commencement* of a suit on the obligation, however, does not prevent subsequent foreclosure on the lien. In *Brice v. Walker*,<sup>64</sup> defendant held plaintiff's note secured by a mortgage on plaintiff's automobile. Defendant brought suit in Arizona on the note and other items, but later amended to strike the count on the note. Plaintiff then brought this action to recover possession claiming defendant had waived his mortgage lien by bringing suit on the note. It was held that there was no election and that defendant could still enforce his lien.

In *Roullard v. Rosenberg Bros. & Co.*,<sup>65</sup> plaintiff contracted to sell his orchard to J. who gave plaintiff a chattel mortgage on five years' crops, whereby plaintiff had the right to possess and sell the crop and apply the proceeds to the unpaid balance. Thereafter, assignees of J. sold a crop to defendant whom plaintiff thereupon sued for conversion. J. then defaulted under the contract of sale and plaintiff sued J. to quiet title and recover possession. Defendant then filed a supplemental answer in the conversion action alleging that plaintiff elected by the quiet title action to recover the land and was therefore barred from recovering the purchase price, and hence from recovering against defendant, inasmuch as plaintiff's right to the crop was only for application on the price.

Defendant's argument was rejected by the court because neither action had proceeded past filing of the complaint and answers. Moreover, the court said if there was an election it was to pursue the conversion remedy which was first in time. Finally, the defense is not available to a stranger and, as against defendant, plaintiff never had an election. Thus, while plaintiff could not recover both the land and the purchase price, until the land was recovered he could pursue the security for the purchase price. It was suggested, however, that the conversion action may prevent pursuit of the quiet title suit against J. on the theory that it affirms the sales contract and, hence, title in the purchaser.<sup>66</sup>

In *California Nat. Supply Co. v. Porter*<sup>67</sup> plaintiff had furnished materials to defendant for which it filed a mechanics' lien. Defendant thereafter gave plaintiff a note for the amount involved upon which plaintiff recovered judgment. Plaintiff then brought this action to foreclose the lien. The court noted that there was good authority for holding that mere acceptance of the note constituted a satisfaction which precluded enforcement of the lien. It held that, in any event, recover-

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<sup>64</sup> 50 Cal. App. 49, 192 Pac. 549 (1920).

<sup>65</sup> 193 Cal. 360, 224 Pac. 449 (1924).

<sup>66</sup> *Id.* at 367, 224 Pac. at 451 (1924).

<sup>67</sup> 83 Cal. App. 758, 257 Pac. 161 (1927).

ing judgment on the note certainly abated plaintiff's action on the lien. The court said:<sup>68</sup>

. . . [A]nd also it may be said that upon the principle of estoppel the securing of the judgment upon the note results in a waiver of appellant's right to seek another remedy by asserting and foreclosing the lien as a means of realizing upon the same obligation.

Possibly, this result could also rest solely on principles of *res judicata*, inasmuch as there was a final judgment. In either case it illustrates the danger of a lienor invoking another remedy which results in either loss or subordination of the lien, or possible diminution in the certainty of his recovery.

### *Conditional Sales Contract Cases*

A great many election problems, and a great deal of confusion, have arisen out of the cases involving the breach of conditional sales contract on the part of the buyer.<sup>69</sup> In that event, special contract provisions aside, the seller may terminate the contract and repossess or sue on the contract for the purchase price due,<sup>70</sup> the choice being dictated by such practical considerations as the present value of the property and the financial responsibility of the buyer.

### *Commencement of Suit*

In some of the earlier cases, statements were made to the effect that merely filing suit to recover the purchase price ratifies the sale and vests title in the defendant thereafter precluding repossession.<sup>71</sup> However, in *Parke, etc. Co. v. White River L. Co.*, the action had gone to judgment and in *Geo. J. Birkel Co. v. Nast*, plaintiff had attached defendant's property, both of which were positive acts constituting a detriment or disadvantage to defendant. In *Silverstin v. Kohler & Chase*,<sup>72</sup> seller had recovered judgment in an action for installments due. On purchaser's subsequent default seller repossessed. Seller's action for installments due was held entirely in accord with the contract and did not vest title in buyer precluding seller's right to repossess. Citing, but not distinguishing *Parke*, the court declared that if seller

<sup>68</sup> *Id.* at 763, 257 Pac. at 163.

<sup>69</sup> *Silverstin v. Kohler & Chase*, 181 Cal. 51, 183 Pac. 451 (1919); *Parke etc. Co. v. White River L. Co.*, 101 Cal. 37, 85 Pac. 492 (1897); *Smith v. Miller*, 5 Cal. App. 2d 564, 43 P.2d 347 (1935); *Cocores v. Assimopoulos*, 127 Cal. App. 360, 15 P.2d 892 (1932); *Martin Music Co. v. Robb*, 115 Cal. App. 414, 1 P.2d 1000 (1931); *DeLaval Pac. Co. v. United C. & D. Co.*, 65 Cal. App. 584, 224 Pac. 766 (1924); *Geo. J. Birkel Co. v. Nast*, 20 Cal. App. 651, 129 Pac. 945 (1912).

<sup>70</sup> *Cocores v. Assimopoulos*, *supra* note 69.

<sup>71</sup> *Parke etc. Co. v. White River L. Co.*, *supra* note 69; *Geo. J. Birkel Co. v. Nast*, *supra* note 69.

<sup>72</sup> *Silverstin v. Kohler & Chase*, *supra* note 69.



had brought an action to recover the *full* purchase price, title would have vested in the purchaser.

In the *DeLaval* case,<sup>73</sup> often cited in cases dealing with an election problem, plaintiff sold defendant a piece of equipment and defendant defaulted. Defendant returned it upon plaintiff's demand but without a substantial component thereof. Plaintiff thereupon refused to accept it and sued for damages. Defendant claimed that by demanding return, plaintiff chose its remedy and was confined to it. It was held that there was no election because there was no damage to defendant as he had not returned the property in its original condition. However, influenced by the cases just discussed, the court, in a statement entirely unnecessary to decision on the facts before it, said that "the commencement of an action to enforce one of such remedies is generally considered sufficient to estop a party from thereafter pursuing the other remedy."<sup>74</sup>

### *Danger in Suing for Price*

The danger of suing for the purchase price rather than repossessing under a conditional sales contract is illustrated by *Martin Music Co. v. Robb*.<sup>75</sup> Plaintiff was the vender of a piano and sued defendant upon default for the balance due. Defendant, upon her voluntary petition, was thereafter declared a bankrupt, whereupon plaintiff dismissed his suit and filed a claim in bankruptcy which was allowed in full. Plaintiff's petition in bankruptcy for reclamation of the piano was denied because the piano was declared exempt. Plaintiff then brought this action to recover the piano. Relief was denied on the ground that plaintiff, at least under the particular circumstances, had elected one of two inconsistent remedies. The court discussed but did not decide whether mere filing of the suit constituted an election. It did hold that plaintiff was estopped because defendant, relying upon the plaintiff's suit, filed in bankruptcy and declared the piano as an asset. The court held defendant was justified in relying upon the original suit to establish her title to the piano, i.e., that plaintiff sought the purchase price rather than repossession. This result seems questionable where, as here, the property in question was exempt.

### *Other Action Constituting Election*

Where the vendor first takes possession of the property, he is considered to have selected his remedy and will not thereafter be permitted to sue for the purchase price under the contract. In *Cocores v.*

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<sup>73</sup> *DeLaval Pac. Co. v. United C. & D. Co.*, 65 Cal. App. 584, 224 Pac. 766 (1924).

<sup>74</sup> *Id.* at 586, 224 Pac. at 767.

<sup>75</sup> *Martin Music Co. v. Robb*, *supra* note 69.

*Assimopoulos*<sup>76</sup> plaintiff vendor, upon default, caused a writ of replevin to issue. He thereafter levied on the property under a writ of attachment. The latter process was quashed upon the ground that defendant had elected to terminate the contract and take possession by the claim and delivery process.<sup>77</sup>

In *Smith v. Miller*<sup>78</sup> the vendor's conduct consisting of acts short of filing suit were considered an election to seek the purchase price. Plaintiff's assignor purchased furniture from a store and thereafter defaulted. The store notified him that it looked to him for payment. The assignor then went through bankruptcy, but the store did not file a claim. The furniture was then placed in storage and the warehouseman, defendant, delivered it up to the store on demand. Plaintiff sued defendant for conversion and it was held that all the circumstances together—the long delay, notices seeking payment and demands therefor—indicated an election to seek the purchase price rather than repossession.

#### 4. Title or Possession to Realty

Election of remedies is sometimes urged as a defense in various actions involving title to or possession of realty. A particularly troublesome situation is the case of the defaulting lessee who abandons possession prior to expiration of the lease term.<sup>79</sup> While the legal effect in such a situation is far from certain, the lessor is generally considered to have two remedies: first, he may rest upon the contract and sue for each installment of rent as it falls due; or, second, he may take possession, relet and recover any difference in rental from the defaulting lessee at the end of the original term, provided, it seems, notice is given the lessee that the lessor intends to pursue such a course.<sup>80</sup> These remedies are inconsistent, however, and a reletting will ordinarily be considered an election precluding later suit for rental installments.<sup>81</sup>

The lessor in this situation is obviously confronted with a serious dilemma. He is faced with the alternative of bringing successive suits while the premises remain idle or reletting and waiting until the end of the term to recover any deficiency, at which time the original lessee may not be available or financially responsible. In addition, he is faced

<sup>76</sup> *Cocores v. Assimopoulos*, *supra* note 69.

<sup>77</sup> *Cf. Alder v. Drudis*, 30 Cal. 2d 372, 182 P.2d 195 (1947) wherein it was held that claim and delivery is not available where defendant has possession under contract.

<sup>78</sup> *Smith v. Miller*, *supra* note 69.

<sup>79</sup> See discussion and cases in Comment, 7 HAST. L. J. 189 (1956).

<sup>80</sup> *Bradbury v. Higginson*, 162 Cal. 602, 123 Pac. 797 (1912); *Dickinson v. Electric Corp.*, 10 Cal. App. 2d 207, 51 P.2d 205 (1935).

<sup>81</sup> *Ibid.*

with many possible problems in reletting, such as reletting for a period beyond the original term.<sup>82</sup> The problem is covered in most leases today by express provisions allowing re-entry and reletting for the lessee's account. Nevertheless, the problem can still arise, in which event the latest judicial treatment of this perennial problem should be examined before remedial steps are taken.

The defense of election of remedies has been urged and rejected in the case of successive suits by a lessor for unlawful detainer and to quiet title. These remedies are considered consistent because both are grounded upon a claim of title in plaintiff, and proceeding under one or the other constitutes no election.<sup>83</sup>

A unique situation involving real property was treated in *Slater v. Shell Oil Co.*<sup>84</sup> Defendant constructed a pipeline upon plaintiff's property, and plaintiff recovered judgment for the decrease in the market value. Subsequently, plaintiff brought suit for ejectment to enforce removal of the pipeline. Relief was denied on the ground that plaintiff had received full compensation for the continued and permanent maintenance of the pipeline in the first action. The court said that although plaintiff could have sought ejectment originally, "where . . . a party elects to sue for damages past and prospective he is deemed to have waived the invasion and consented to the continued occupancy of the land."<sup>85</sup>

Plaintiff's original action, then, was analogous to an inverse condemnation suit but against a private entity. The court refrained from deciding whether the legal basis of its decision was *res judicata*, estoppel, merger, or election of remedies, declaring that all of these theories united in the principle that one who has had his day in court should not be further permitted to vex his adversary by a subsequent action for the same relief.

### Miscellaneous Situations

Two cases not falling into any of the categories previously discussed seem worthy of mention in that they indicate possible areas where the doctrine of election might be successfully urged, although it was held inapplicable to the particular fact situations considered there.

In *Schumm v. Berg*,<sup>86</sup> an illegitimate son brought suit against the administrator of his father's estate, seeking damages for breach of contract between the mother and father whereby the latter agreed to sup-

<sup>82</sup> *Welcome v. Hess*, 90 Cal. 507, 27 Pac. 369 (1891).

<sup>83</sup> *Mailhes v. Investors Syndicate*, 220 Cal. 735, 32 P.2d 610 (1934).

<sup>84</sup> 58 Cal. App. 2d 864, 137 P.2d 713 (1943).

<sup>85</sup> *Id.* at 870, 137 P.2d at 715.

<sup>86</sup> 37 Cal. 2d 174, 231 P.2d 39 (1951).

port the son. A prior action for support under Civil Code section 196a was held to have abated upon the father's death. It was contended that the plaintiff had chosen his remedy by bringing the former action. This was rejected not only because the contract provided that plaintiff could proceed under the statute but also because the contract provided only for specific items of support amounting to something less than the statutory obligations. Therefore the facts underlying the two remedies were not the same and the two remedies were not inconsistent. It does not seem unlikely, however, that one who contracts to perform some statutory duty might successfully contend that the other was limited to his contractual remedy, or to the statutory remedy if invoked first as in this case.

*Perkins v. Benguet Cons. Min. Co.*<sup>87</sup> was an extremely involved and fascinating case involving litigation of several years duration by a divorced husband and wife over shares of stock in a Philippine corporation. Plaintiff wife sued the corporation for dividends on the stock claimed to be hers. Theretofore, the husband, claiming ownership, had brought suit in New York against the trust company holding the certificates. Plaintiff was impleaded in that action and was adjudged the owner. Among other things, defendant contended in the California action that plaintiff was barred by having elected her remedy in the New York action. Defendant's authority for this was *Fowler v. Bowery Savings Bank*<sup>88</sup> in which defendant bank paid over to the executor of a husband's estate a deposit which the bank knew was claimed by the wife's executor. Wife's executor thereupon recovered judgment against the plaintiff's executor which, however, was unsatisfied. The New York court held that by suing plaintiff's executor, wife's executor had ratified the bank's payment and that this constituted a binding election which prevented later suit against the bank.

The District Court of Appeal, in an opinion by Justice Peters, held that the theory of the *Fowler* case was not followed in California and, if New York law was applicable, that it was no longer followed in New York. The ratification theory was termed a fiction, and there was no election of remedies, which doctrine is grounded upon estoppel, because there was no damage to the defendant corporation by reason of the unsatisfied New York judgment against plaintiff's husband.

It was recognized that the doctrine is usually not available to a stranger to the preceding action or conduct, but the court did not point out one situation wherein a suit against a payee of funds bars subsequent action against the payor. This is the case where an agent makes

<sup>87</sup> 55 Cal. App. 2d 720, 132 P.2d 70 (1942).

<sup>88</sup> 113 N.Y. 450, 21 N.E. 172 (1889).

an unauthorized contract of sale purportedly on his principal's behalf. The principal then has the right to disaffirm and recover the property, ratify and sue the third party for the purchase price, or sue the agent for the purchase price if he has received it.<sup>89</sup> In the latter case there is a true ratification which precludes subsequent action against the third party, presumably, even if judgment against the agent is unsatisfied.

### Conclusion

While it is true that the rule of election of remedies is no longer applied with the harsh results that once ensued, it is still true that a plaintiff may, by some act or omission, deprive himself of the most beneficial possible recovery. It has been seen that the current liberality in pleading is not a universal safeguard against the procedural pitfalls still inherent in the selection and pursuit of a remedy. Accordingly, the plaintiff's attorney must carefully examine all possible theories of recovery and the procedural steps requisite to recovery thereunder prior to selection of one or the other. By the same token, the defendant's attorney will do well to consider each procedural step taken by his adversary in the light of whether the latter may have irrevocably committed himself to, comparatively at least, a disadvantageous course of recovery.

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<sup>89</sup> RESTATEMENT, AGENCY § 97 (1957).